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Fall 1993

### A Tasty Tidbit (review essay)

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#### Recommended Citation

John H. Schlegel, *A Tasty Tidbit (review essay)*, 41 Buff. L. Rev. 1045 (1993).

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## BOOK REVIEW

### A Tasty Tidbit

JOHN HENRY SCHLEGEL\*

Where to start? Where to start? The maniacal book reviewer faced with Morty Horwitz's *The Transformation of American Law 1870-1960*<sup>1</sup> is like the over-exuberant tourist in one of Amsterdam's rijsttafel restaurants, who, having ordered the full twenty condiment curry, has to decide which fascinating tidbit to eat first. Should one start with the shrimp toast or with the hard-boiled egg? The pickle or the candied ginger? The fried banana or the kumquat? Does one start by exorcising from the book the spectre of a nineteenth century idealist world spirit that has Classical Legal Thought and Progressive Legal Thought (always capitalized) running around doing things without the aid of sentient human beings acting in any role other than as an oracular article or treatise writer? Or would it be more appropriate to attempt to banish the odor of late twentieth century theoretical debate that inheres in the book's identification of the critique of positivist social science in the Twenties and Thirties, to the extent that there was any such thing, as "modernist?"<sup>2</sup> Does one choose to comment on a confusion that contrasts the giving of "somewhat more explanatory weight" to "cultural factors" as against the specific force of "social context"?<sup>3</sup> Just what might be the difference? Or would it be more appropriate to highlight an unrelated confusion that defines Realism (also always capitalized) in such a way that it includes two of its primary antagonists, Roscoe Pound and Morris Cohen, and yet allows for the effective silencing of such "hard core" Realists as Charles Clark, Walter Wheeler Cook and Wesley

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\* Professor of Law, State University of New York at Buffalo. This piece, my second attempt to explain these matters, See John Henry Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435 (1989) (book review), is for Morty in the hope that my criticism will make his job easier when it comes time to fill in the ten year gap in his history of American law. Alan Freeman's serious objections to the first half of this essay forced me to think out and sometimes articulate in print the reasons for what will appear to some to be but another example of my pigheadedness. Madeline Henley's comments were extremely helpful.

1. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

2. *Id.* at 6.

3. *Id.* at vii.

Sturges? Or again, does one focus on the author's recognition of the decline of nineteenth century (really nineteenth and twentieth century) causal analysis when the substitute for that analysis is the rendering of a plausible causal sequence—turn of the century industrial reorganization spawned economic and social dislocations that certain legal thinkers argued, more or less successfully, needed to be remedied by changing certain common law and constitutional doctrines—into the passive voice—"Classical Legal Thought was forced to confront both external and internal attacks on its very foundations"?<sup>4</sup> Or is it better just to stick with the rise of "thick description"<sup>5</sup> when thick description turns out to be the presentation of multiple transformations of vaguely separable doctrinal lines in a given legal field? Choices, choices, choices.

The question of where to start criticism of Horwitz's scholarly analysis is made all the more difficult because the book is not without its excellences. Horwitz's rendering of the elements of Classical Legal Thought is on the whole convincing. His argument for the continuity of a brand of progressive political commentary and commitment on the part of a group of legal academics from the Teens through the Thirties is clearly correct, as is his attempt to see Karl Llewellyn as a bit more marginal a figure in the story of Realism than is usually the case. And his implicit, but never explicit, causal argument about the relationship of Classical Legal Thought to industrial reorganization is, I think, also correct. Moreover, I should be careful in my carping. It is my emphasis on the importance of focusing on the social science research done by individual Realists for understanding Realism that Horwitz is attempting to undermine.<sup>6</sup> Yet, even among the excellent parts of the book can be found tempting targets. For example, what does one make of a book that has for its central analytic apparatus the distinction between Classical Legal Thought and Progressive Legal Thought, yet notes that "almost all . . . efforts at mutually exclusive categorical formulations have come to seem less and less satisfying"?<sup>7</sup> Does one stop to complain about the logical defect in the apparatus of scholarship or just pass on? Or what of the logic of the argument that social science research is not important as a defining characteristic of Realism be-

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4. *Id.* at 4.

5. *Id.* at vii. The phrase has been lifted from the anthropologist, Clifford Geertz. See Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3, 6 (1973).

6. See John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459 (1979); John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 *BUFF. L. REV.* 195 (1980).

7. HORWITZ, *supra* note 1, at viii.

cause liberal political commitment is? Is silence the appropriate response or does one complain that the debate over value-free and value-laden social science that most legal academics in the Twenties and Thirties did not know about (after all, at the time it was largely a European debate in another language) would, in any case, have been seen as irrelevant since it was social science knowledge that was going to be the engine for the progressive reform that even Horwitz argues was at the root of Realism? But choices have to be made nonetheless. So, I shall make mine by focusing on the question of causation. Specifically, how may an historian writing the history of things legal—laws, lawyers and legal institutions in society—deploy the ancient concept of causation? May one make causal statements much as one would in, oh say, military history or is one, of necessity, reduced to rendering pictures of the state of legal consciousness at a succession of specific times. That question, I think, is at the root of many of the problems with this book. Whether I have taken the shrimp toast or the hard boiled egg is for the reader to say.

It is a bad habit, I know, but I must admit it anyway: when I get a book of academic history I always read the footnotes first. Some may think my habit a practice like quickly licking the corn meal off the bottom of the pizza, but I rather think it like eating my dessert before my main course. You should try it sometime—you would be astonished what you might learn. For example, though Horwitz asserts that he continues to believe “that the development of law cannot be understood independently of social context,”<sup>8</sup> it is clear from his footnotes that the book was produced in a very well-stocked law library. Law libraries are not well known for the content and quality of the social context to be found therein and so, not surprisingly, Horwitz’s footnotes center in the traditional legal materials—cases, law review articles and treatises.<sup>9</sup> Indeed, but for two footnotes,<sup>10</sup> that library could have been at Chicago, Columbia, or Yale.<sup>11</sup> That it was produced at Harvard might thus be seen as an accident and the book an example of something that it purports not to be, a contextless thing. Yet, I do not think that this contextless-

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8. *Id.* at vii.

9. This is not to say that one might not learn a reasonable amount of social context in a law library. With care, one might learn a great deal. But to do so one would have to read against the grain, as it were, of the materials usually gathered in that place.

10. HORWITZ, *supra* note 1, at 340. Notes 82-83 refer to two letters available in manuscript only at Harvard.

11. It could not have been at many of our more provincial law schools because citation to the nineteenth century treatise literature is copious and few such libraries own much of that material.

ness is an accident. It is quite clearly the result of being at *the* Harvard Law School and sharing a party wall with the *eminence rouge* of Critical Legal Studies (CLS), Duncan Kennedy.

Causation is a topic that has bedeviled contemporary historians a great deal, indeed, probably more than is appropriate. Peter Novick has detailed the arguments admirably in his recent book.<sup>12</sup> An unkind summary of those arguments would consist of the assertion that since we no longer have faith in the mechanical understanding of causality that produced nineteenth and early twentieth century history—if the world doesn't work like a machine—then we can't say much of anything about causation at all. Things happen; they are not changed. The shift in grammatical construction to the passive from the active is, I think, intentional. Events, goes the argument, are both over-determined—multiple causes combine in mysterious ways to produce a result that no one of them could bring about—and under-determined—no one antecedent necessarily leads to any consequent. Moreover, causation isn't important; the capacity of humans to effect events is wildly overblown.<sup>13</sup> Like all of the rest of modernism it needs to be discarded as a perhaps noble, but basically misguided, dream.

Horwitz got hit with all of these arguments about causation after he published his first book<sup>14</sup> in which he implied that the content of ante-bellum legal doctrine was decisively shaped by a desire to promote economic expansion in the new country. In effect, law was put at the service of commerce. The difficulties with Horwitz's argument were numerous,<sup>15</sup> but the one that I wish to focus on is the fact that he offered no mechanism for the apparently causal link. He simply argued, in the style that law professors so easily become used to, that, since the policies that could be inferred from the relevant changes in the legal rules<sup>16</sup> served the commercial elite, the purpose of those changes was to serve that elite. His was a peculiar argument, not so much because it was wrongheaded, but because, in the course of making it, Horwitz seemed never to settle on a mechanism

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12. PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* (1988).

13. I wish to avoid taking any explicit position on the much disputed, deeply convoluted question of the extent of "human agency" in history, beyond what I offer later in the text. It is a problem that, it seems to me, can be traced to both the rise of overarching "social theory" in the nineteenth century (though of course it is a Christological problem earlier) and the breakdown of nineteenth century notions of causation. I will let anyone who wishes wallow in it if only they allow me not to participate.

14. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

15. Wythe Holt, *Morton J. Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663 (1982) is a clear discussion of Horwitz and his critics.

16. Or the policies that occasionally were explicitly stated by judges at the time of those changes.

of causation. "How did the lawyers know exactly what commerce needed to thrive?" seemed to be a sensible question to ask. Yet, it was a question that Horwitz seemingly refused to answer.

My colleague, Fred Konefsky, explored this peculiar defect in Horwitz's argument some years ago in the *Stanford Law Review*.<sup>17</sup> He showed, satisfactorily, I think, that Horwitz could have made a stronger argument had he paid attention to the web of social relations that bound at least one city's legal and commercial communities together. And Konefsky's example was not an unimportant city either; it was Boston. The point was simple. Humans in their social relations of class and caste made the connections possible between the legal and commercial elites. The lawyers knew what the merchants needed because they not only had merchants as clients, a rather dumbly obvious answer, but because they shared the same social space as the merchants. Thus, it was not that The Law, some abstract entity, served the *needs* of mercantile capitalism, but that the humans living side by side came to understand the world in similar ways because they lived side by side and so forged a law that reflected that common understanding. Law was forged not on the playing fields of Eton, or more aptly in Harvard Yard, but in the numerous drawing rooms, club rooms and meeting rooms of Boston and Cambridge. People who lived together came to see the world similarly and, of course, the reverse as well; people who saw the world similarly came to live together, came to join each other's clubs and came to eat in each other's homes.

Now, Konefsky's argument was not the only one that might have been made in aid of Horwitz's book. It is an approach, but only an approach, to answering the more general question of how ideas or broader cultural understandings arise in a community and are transmitted between and among its members. Obviously, social relations are situated in a vast matrix that includes newspapers and journals of opinion, oracles of authority or reason such as parents, teachers and preachers, and even the knowledge gained from working in, or just walking and looking at, the mills, marts and shops of a place and time. All of these things may be as important for forming and transmitting ideas or cultural understandings as more focused social groupings of relative peers. Yet, I think, for reasons that I hope to make clear, that it is a good and sensible rule, an heuristic device, that one start inquiry into a question of causation as did Konefsky, with individuals in their web of social relations.

I assume that Horwitz knew of Konefsky's argument at the time that he began his more recent book. Yet it is clear that Horwitz

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17. Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 *STAN. L. REV.* 1119 (1988).

chose to ignore the suggestion that Konefsky implicitly made about how to go about the task of detailing the changes in law seen as a body of thought. The reader learns nothing about the social relations of the individuals whose intellectual product is described. Indeed, there are no people in this book except those acting out the disembodied role of article, treatise, or occasionally, judicial opinion writer. So, if the first book was law as judicial and occasionally legislative product—the work of the judicial elite, this second book is law as explanation—the work of the academic and the more literate, or at least literary, lawyer elite. This shift is not perverse. The professionalization of the legal academic and the great growth of the treatise literature are important events in law in the late nineteenth and early twentieth century. Yet this shift in focus leaves the reader with the same question that the earlier book raised. “How did the changes in the law that Horwitz describes take place? In particular, what caused these changes?” Before exploring this question it is sensible to review Horwitz’s argument.

Stated simply Horwitz wishes to explain how Classical Legal Thought, the name Duncan Kennedy sensibly gave to the legal world on either side of the turn of the century,<sup>18</sup> was attacked and supplanted by what Horwitz calls “Progressive Legal Thought.” Progressive Legal Thought is the legal thought of the Twenties and Thirties that we are left to infer reappeared after the unfortunate interposition of Legal Process Thought only to be again supplanted, this time by our current Conservative Legal Thought. My string of abstractions is meant seriously. What Horwitz is attempting to do is to explain changes in law seen from a great height and in a comprehensive panorama, at the level of systems of thought, interconnected beliefs that hang together to make a blanket of thought, if a sometimes tattered one.

As Horwitz sees it, Classical Legal Thought was an attempt to demonstrate that the law is neutral and apolitical and so it is thus natural, not the artificial product of interest, in the nineteenth century sense. Classical Legal Thought did this by first dividing all law into the public and the private, the areas of governmental force and of individual will. Exercise of the former was limited by principles that forbid the redistribution of wealth while sanctioning efforts of police. Exercise of the latter was supported by efforts to make the will knowable and safeguarded by rules forbidding governmental, and particularly judicial interference, with its manifestation, except in narrowly defined circumstances. Seen thus, Classical Legal Thought was a structure of category-based oppositions—

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18. Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. LAW & SOC. 3 (1980).

tort/contract, direct/indirect, taxation/taking—arranged in an hierarchical fashion with public/private at its apex, policed by a judiciary committed to the notion that by dint of logic alone one can work up and down the category structure to place fact situations into their proper category and so to solve legal problems without consideration of individual or social advantage, without, as it were, transgressing the greatest categorical division of them all—law/politics.

How this way of thinking about the world came to be demolished is the substance of most of the exposition in the book. Here Horwitz sees, as best as I can tell, three forces at work. The first is the criticism of aspects of the doctrinal whole by those who shared its conservative politics. The second is the criticism of aspects of that whole by those Progressive Legal Theorists who were opposed to the politics of the edifice's defenders and who are the heroes of the piece. And the third is the changes in the American economy that were caused by, and the result of, the growth of the large integrated manufacturing corporation and that were accompanied by a rapid growth in our immigrant population and in our proportion of urban dwellers. However, Horwitz never manages to explain how these three things interrelate. This is not because he does not understand the need to do so. In his preface, after adverting to the death of causation and with it of objectivity, he notes, "As a result, the book constantly wavers between, on the one hand, conventional efforts at historical explanation that continue to derive from nineteenth-century models of objectivity, and, on the other hand, the recognition that modernism has challenged the objectivity of these forms in many different ways."<sup>19</sup> Why might Horwitz so knowingly "waver" in this way?

Here I wish to make a great leap of (hopefully, "good") faith. My guess is that the problem has to do with the party wall that Horwitz shares with Duncan Kennedy, both in fact and in eponym. Horwitz's first book took heavy hits from not only the conservative legal historians, but also from the self-styled Crits, this despite the fact that the book was prominently associated in the academic mind with Critical Legal Studies.<sup>20</sup> The reason why Horwitz took hits from fellow Crits is that he asserted that the revisions to Nineteenth Century legal doctrine that he cataloged were made because they aided the growth of commerce. For the most doctrinaire of Crits, for those for whom both political and theoretical purity were important, this was a grievous error. Horwitz's politics may have been left (and so, infuriating the conservatives a "good thing") but the theory was all wrong. Why? Because cardinal rule one of CLS was that legal rule

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19. HORWITZ, *supra* note 1, at ix.

20. See Holt, *supra* note 15.



systems (and usually legal rules) are indeterminate and so have no necessary relationship to legal outcomes or to social conditions. Law might have been otherwise and the capitalists would have prospered; the capitalist's needs might have been otherwise and the law might have been the same.

This assertion, best stated by Robert Gordon in his *Critical Legal Studies Symposium* piece,<sup>21</sup> was known in the trade as the critique of functionalism, the notion that the law serves to aid the needs of a society or at least some of a society's classes. Horwitz's first response to this assertion—that rule systems have a certain "tilt" or natural political tendency<sup>22</sup>—was received with less than universal applause from his Crit critics. Horwitz's work in this later book can be seen as a second response, as an attempt to go both ways, as it were. He would and does make both classical mono-causal arguments and modern multi-causal arguments. The result is a predictable mishmash of things that seem to happen as a result of the economic changes this country went through at the turn of the century and things that seem to happen for no good reason other than because some article or treatise writer saw some "problem" or, as the *avant* word goes, lacunae in the doctrine. So sometimes, particularly in the last half of the book, the reader is in a rather traditional intellectual history and at other times the reader is in a much more complicated, though not much more satisfactory, world that is some cross between intellectual and old-fashioned political history of the kind that Charles Beard made famous.<sup>23</sup>

Now it is important to see that it is the last half of the book that is most purely Crit and the first half that is most mishmash. After struggling for a while with the mixture of political, intellectual and Crit historical approaches, Horwitz seems to have given up his attempt to meet his friendly Crit critics and shifted to an honored form, the history of ideas, the endless chatter of the mandarins and their idea computers, a society out of Star Trek if ever there were one.

Two examples ought to suggest the dimensions of the shift. The earlier one derives from Horwitz's observation that in the late nine-

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21. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

22. To my knowledge Horwitz never published a serious defense of "tilt," though in *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 175-76 (1985), he adverts to the concept. For a good idea about what that defense ought to have looked like, see Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280 (1984).

23. The classic citation is CHARLES AUSTIN BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913), in which Beard argued that the Constitution was designed to protect property because the Framers had property and were afraid that the propertyless would use control over state government to take it away from them.

teenth century, "case law moved decisively in the direction of holding an organization liable for an agent's contracts if a third party could reasonably have believed that the agent had authority, whether or not he actually did," while "the central effort of the treatise literature was to subordinate the law of agency to the law of contract and to emphasize that only actual authority could justify liability." Horwitz then asks:

How does one account for these differences? The first thing to note is that an objective standard—apparent authority—triumphed earlier in the law of agency than in any other field, leading one to suppose that there is a strong correlation between the rise of the corporation and the emergence of objective standards. Once it is realized that the individualistic underpinnings of the will theory [of contracts] were difficult to apply to large organizations—indeed, that the emergence of large organizations threatened to render the will theory impractical, if not virtually incoherent—it is no surprise that courts turned to an objective "reasonableness" standard. In general, there appears to be a strong correlation between the rise of the corporation and the emergence of an anti-individualistic objective theory in all fields of law.

But how does one explain the contrary thrust of the treatise literature? Perhaps this is a clue to one of the primary functions of the classical legal treatise, which sought not simply to report on the state of the law but to advance a highly abstract and integrated version that was grounded in a picture of a decentralized, individualistic economic and political order. Its most fundamental expression can be found in the set of ideas that constituted the doctrine of freedom of contract.<sup>24</sup>

Here we have a plausible causal argument—the rise of the corporation yields the firming up of the concept of apparent authority—hedged with "suppose," "no surprise" and "appears"—that is fused to a non-causal argument about the "function" of the treatise literature—hedged about with a "perhaps"—by means of a paragraph break. Mishmash? Surely.

The second, contrasting example comes from a discussion of the academic commentary on the value standard in rate regulation. Horwitz begins, "Legal positivism combined with the de-physicalization of property to produce dramatic legal changes in the area of judicial oversight of the 'reasonableness' of governmentally regulated rates."<sup>25</sup> Then, noting that the Supreme Court's adoption of the reproduction cost standard for measuring present value resulted in great increases in utility rates as a result of the inflation that followed World War I, he reviews three articles, one each by Donald R. Richberg, Gerard C. Henderson and Robert L. Hale. He concludes

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24. HORWITZ, *supra*, note 1, at 45.

25. *Id.* at 160.

that Richberg and Henderson were "part of a movement that emphasized that the measure of value was not simply a factual or scientific question but also one deeply embedded in controversies about the nature and purpose of property"<sup>26</sup> and that Hale then:

not only totally reconceptualized property as a delegation of state power to private individuals but also pushed this conclusion still further. 'Ownership is an indirect method whereby the government coerces some to yield an income to the owners. When the law turns around and curtails the incomes of property owners, it is in substance curtailing the salaries of public officials or pensioners.'<sup>27</sup>

I suppose that one could call this a causal argument—the adherence of the Supreme Court to a legal standard that at the time caused utility rates to soar caused thinkers to come up with arguments that undermined the foundations of the Court's reasoning—but the weight of the effort is not in the direction of making such an analysis but on the succession of articles that did the demolition work. And succession is not even the right word, for the article that he begins with was published after the other two. The idea then is developed logically, but somehow is divorced from the time and place in which it was made. This is the stuff of the history of ideas I would say.

Thus shifting to the history of ideas was easy for Horwitz to do for two reasons. First, it is an old and accepted form and a form that comes naturally to the law professor who day in and day out presents doctrine in a contextless vacuum, or more accurately in a vacuum in which it is acceptable to present the context as if it could be discovered through policy analysis while sitting in the proverbial arm chair. Second, because it is a succession of ideas, intellectual history is subject to none of the Crit strictures so long as it avoids work showing the kind of progressive unfolding of an idea that one associates with Arthur O. Lovejoy.<sup>28</sup> The more random and occasional the sequence of events the better it fits this Crit model. Anything can happen because nothing is logically entailed, nothing necessarily follows.

Retreating into the history of ideas may make it easier to share a party wall, but on the whole it seems to me to make little sense because it misunderstands the force of the CLS position. The fabled indeterminacy thesis is in fact a logical claim. It states that as a matter of logic alone, of the rules of implication, doctrine can never

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26. *Id.* at 161-62.

27. *Id.* at 164, quoting Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214 (1922).

28. Here the classic citation is ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* (1936). More useful for the flavor of his work is ARTHUR O. LOVEJOY, *ESSAYS IN THE HISTORY OF IDEAS* (1948).

yield a determinate answer to a legal question. This is because the meaning of words is not determinate. Words do not take their meaning as by attaching tags on items at a garage sale; they take their meaning from other words that they are associated with. Those associations are not necessary or logical but arbitrary. The meaning of a rule and so its impact, if any, *as a matter of logic alone* could always be otherwise.

So far so good, but, at the same time, although a legal rule could at any time mean, and thus be, something else, at any particular time it is rather firmly set in a rather narrow range of possible meanings. Its meaning at that particular time is thus not fixed, but rather tethered like a horse to a post. It may wander some and indeed is likely to do so. So, while a rule could, as a logical matter, be almost anything, as a psychological matter it is not likely to be much changed in meaning over a reasonably short period of time. Thus, one might say that at any given time the law is like a poor child in America; when newly born that child may become anyone or anything he or she wishes, but in reality that child is likely to become one of a rather restricted range of possibilities delimited best by a kind of class analysis.<sup>29</sup>

That the indeterminacy claim is a logical one is clear from something Robert Gordon wrote:

[T]here are plenty of short- and medium-run stable regularities in social life, including regularities in the interpretation and application, in given contexts, of legal rules. Lawyers, in fact, are constantly making predictions for their clients on the basis of those regularities. The Critical claim of indeterminacy is simply that none of these regularities are *necessary* consequences of the adoption of a given regime of rules.<sup>30</sup>

Here, as Gordon indicates himself, the key word is "necessary." Predictable relationships of cause and effect are possible at any given time because it is a particular given time. This solves the historian's narrow problem of understanding meaning at a particular time because the historian is only interested in a particular time and at that particular time meaning is neither fixed nor unknowable. It is reasonably approximatible, about all that one might reasonably ask of a human institution. And at one time Horwitz seems

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29. An identical point can be made with respect to entire rule systems. As a logical matter they can mean anything—as Alan Freeman used to argue in class, the United States Constitution can be read to outlaw capitalism. But as a matter of understanding at a particular time and place the meaning of a rule system is narrow, but not fixed. Were it truly fixed there would be no room for change that was not a simple over-ruling of prior precedent and such change is actually the most typical change of all in law. Freeman makes this point eloquently in *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 316-18 (1988).

30. Gordon, *supra* note 21, at 125.

to have understood this, for he adverted to:

the obvious fact that when abstract conceptions are used in specific historical contexts they have more limited meaning and more specific argumentative functions. We have spent too much effort repeating the demonstrations of the indeterminacy of concepts in a logical vacuum, but not enough time trying to show that in particular contexts the choice of one theory over another is not random or accidental because history and usage have limited their deepest meanings and applications.<sup>31</sup>

Thus a proposition that is of the greatest moment for the teaching of law students—law could be otherwise; try to make it so!—is for historians, working within the “short- and medium- run,” of some interest, but hardly a matter on the basis of which one should radically change the way one does history.<sup>32</sup>

To raise the question of necessity is, however, to raise the question of causation. What does one say about how things have happened after the death of causation? Here again the problem seems to be rather overblown. To declare that there are no necessary relationships between events in the Nineteenth Century sense of invariable, always true in any place and time, is not to deny that there are causes to events. The ownership of the means of production may not be the lever that Marx thought it would be, the ever increasing expansion of bureaucratic rationality may not be as inevitable as Weber thought and the drive to modernize, in the sense of make functional, all of social life may not be as universal as Parsons and others believed, still, people do cause things to happen. Only if you want your social forces to be arrayed on the scale of the titans of western, post-enlightenment social theory does the lack of those forces lead to the proposition that causation is dead, or in the more extreme deconstructionist mode, that the subject is dead. True, the nineteenth century subject, best symbolized on the dust jacket of Paul Johnson's “Birth of the Modern,” the male Titan triumphantly on top of the highest mountain, is dead. But people do do things and occasionally those things have some effect in the world outside the household in which they are done. The effects may not be the ones intended; after all intent is easily overwhelmed by the unintended use to which any text—written or otherwise—may be put by any

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31. Horwitz, *supra* note 22, at 176. The great portion of the article appears in the book under review, though not this passage.

32. For the historian of the long- or medium- run the matter is quite different. Horwitz is clearly not working in the short run. I believe that he is working on the short side of the medium run, but I see that others could disagree with me, if only on the basis of the great economic change that took place during the period about which Horwitz is writing, and because he is chronicling a change in the legal understanding. I think that that might be an interesting argument, but I am not going to have it with myself, though I invite the reader to have it with me.

reader, and most of the effects of most actions largely will be overwhelmed by Willard Hurst's "drift and default,"<sup>33</sup> but they are effects for which one may attribute a cause, if not a grand one.

If meaning may, while not be fixed for all time, be tethered for a while and cause be ascribed, if not for all times and places, at least for particular times and places, how then does one identify the cause of either the relative fixity or of equally relative change in legal understandings? Here one might do many things. One might start with newspapers and journals of opinion or with oracles of authority or reason. But I think it better to begin by situating the events in question in the web of social relations that gave meaning to either the fixity or the change, for it was within those social relations that meaning was more or less tethered, and so to look within that web for the cause of the change or fixity that one is interested in explaining, for it is from the shared understandings of the world that tend to dominate social relations that the impetus for change or fixity will be found.<sup>34</sup>

By so emphasizing the importance of seeing and taking account of the social relations of legal thinkers I do not wish to be seen as advocating what a friendly critic of my ideas once trenchantly called the "ladies afternoon tea circle" theory of human agency in history. Understanding the social circumstances of a group of thinkers—who they knew and talked to, what they cared about, why they wrote—is neither necessary nor sufficient to the writing of good history.<sup>35</sup> It is only primary to that activity, the place where, as I said earlier, it is good and sensible to start and thus a valuable heuristic device.

Why primary? Simply because humans, yes, even scholars, are generally not isolates. Their work gains meaning for them in (and

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33. A good word needs to be said here for "drift and default." If grand patterns to Western or even American civilization are passe, then drift and default are likely to overwhelm most human action. If drift and default are in fact a disguised form of "tilt," the collective minor actions of dozens of human, (presumably not benign) capitalist, actors, then plainly, whatever each intended, the collection of actions caused some changes in the social system. Thus, Hurst's critics cannot have it both ways. They cannot both reject causation and reject drift and default without imputing intentionality to the cosmos. I find it amusing that they should be thus driven to Einstein's "God does not play dice", but I doubt that most of Hurst's critics will feel comfortable with the possibility that the universe has a teleology, at least unless they truly believe that the only likely destination of mankind is to go to hell in a handbasket.

34. N. E. H. Hull, *Networks and Bricolage: A Prolegomena to a History of Twentieth Century Academic Jurisprudence*, 35 AM. J. LEGAL HIST. 307 (1991) makes a related argument.

35. And it is only the writing of history that I am talking about. Political theory or jurisprudence may proceed in an historical vacuum as they are wont to do. Indeed, as best as I can figure out, part of the joy of working in such fields is that of making ancient texts sing modern songs. I, at least, will not much care so long as the practitioners do not attempt to pawn their works off as an attempt to render meaning of a time past.

from) the web of social relations in which they find (and place) themselves. They may understand the world in conformity with the understandings of the world dominant within their social space or may see (and act) in opposition to those understandings. But it is here that life is predominantly lived and so it is here that, as a rule, historical inquiry ought to start.<sup>36</sup>

Why not necessary? Simply because traces of the social relations of a thinker are far more likely to be lost than that thinker's work product. The absence of evidence of such relations does not mean that analysis need stop, only that caution need be exercised.<sup>37</sup>

Why not sufficient? Simply because ideas can come from and stray beyond the narrow confines of any social circle. Equally importantly, it is not only individual actors that may be seen as causal agents in history; social movements, legal or informal institutions, struggles over ideas or the shape of a government are all potential "causes" of historical stasis or change. Indeed, as Braudel has taught us, even geography and climate may be seen as causal.<sup>38</sup>

Yet, all that said, legal and most other history is human history, especially so when one focuses on a product of human culture such as law. It is intelligible to talk about law and the labor movement in the last years of the nineteenth century. It is likewise plausible to talk about Progressive Legal Thought. However, it is implausible to ignore the fact that neither the nineteenth century labor movement nor Progressive Legal Thought instantiated itself. Both were instantiated by diverse individuals in diverse places acting for diverse, as well as for common, reasons. Neither existed independent of the human actors who participated in the relevant activities. The roles of these human actors may be impossible to identify or, when identified, may even be uninteresting and so plausibly ignored. But, without their action there would have been nothing to study. And so, the primary rule, the heuristic one, is: situate the thinker in a time, place and circle, if you can, before going on. Then,

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36. At the same time, as Heisenberg has taught us all, action at a distance, the bogey of the nineteenth century mechanical universe that brought us the ideas about causation that still bedevil us, is not only possible, it takes place every day. Ideas do at times skip like stones across a calm or even roiled pond and the stories of simultaneous separate invention in the history of science make obvious the point that similar ideas can arise with no more contact between their authors than participation in the same general activity, than going to different schools together. But, in the history of science these stories are notable because they are exceptions. So too in law. Social relations are a more likely explanation for either fixity or change than either chance or the world spirit instantiating itself.

37. For a good example of what can be done with limited materials see DONALD R. HOWARD, *CHAUCE: HIS LIFE, HIS WORKS, HIS WORLD* (1987).

38. See FERNAND BRAUDEL, *THE MEDITERRANEAN AND THE MEDITERRANEAN WORLD IN THE AGE OF PHILIP II* (1954).

that task accomplished or failed, work at the level of movements, institutions or struggles as you wish and will.

With the source of Horwitz's problem thus made clear, or at least clearer, the defects in the analysis that created the problem made explicit and a possible solution to that problem outlined, it is possible to return to Horwitz's argument in the book itself. At first Horwitz seems to want to deny the death of causation and to assert a proposition familiar to nineteenth century minds about the relationship between economic change and legal change. Change in one led to change in the other. But he slowly backs off from that proposition. Again, the reason for that change is anything but clear, but, to me at least, the choice to do so seems misguided. Here again Robert Gordon has something to offer when he counsels fellow Crit historians that it may not be uncalled-for when readers ask that Crits:

embed their story in a narrative context that would at least supply *subjects* and *occasions* to the narrative to show that it is human beings with reasons and motives, not disembodied Spirits, who drive the manufacture of legal concepts: Who pushed which arguments? What happened to destabilize previously stable conventions? We ought to have a rule of style: no sentence without a subject; no intellectual move without a reason—even if the particular subject and reason may sometimes be largely incidental to the grander thematic history of legal consciousness.<sup>39</sup>

Horwitz seems to follow one of these strictures very well; almost all sentences have subjects and when they do not it is because the subject is so insignificant that no one could possibly know whom the subject was.<sup>40</sup> But as for occasions, the social relations in which the thinker may be understood, the reader is left sadly at sea.

Now it is often difficult to infer the occasion for the writing of any article or treatise. Sometimes the historian reader is told directly, but most often that is not the case. One then must infer the occasion, the context that gives meaning, more or less, to the text. Here is where Horwitz fails dismally, largely, I think, because he both pitches his reason—economic change—so high that he is deeply vulnerable to the criticism from the other side of the party wall that causation is dead and because he has absorbed just enough of that criticism to allow the pure historian of ideas inside to assert itself. After all, the truly amazing thing about Horwitz's first book was that it married traditional intellectual history as the history of ideas with a Beardian economic interpretation<sup>41</sup> of all the shifts in legal

39. Gordon, *supra* note 21, at 118 (footnotes omitted).

40. Indeed many of the subjects are quite obscure even to the legal historian.

41. See *supra* note 23 for Beard's argument that directly parallels Horwitz's argument in his first book as set forth above. HORWITZ, *supra* note 1, at 5.



doctrine in the early nineteenth century. If that marriage is somehow problematic, it is ever so easy to fall back on the history of ideas model and reduce the humans to virtual ciphers, the authors, devoid of agency or intent and thus suitably post-modern, of texts that merit attention without regard to the occasion of their production or use. It is the mistake that Gordon cautions against and part of Horwitz's mistake in his earlier book that Konefsky attempted to repair.

Could one do the same repair job on this book? I think that the answer is "Yes" and what is more important doing so might help to explain a modest anomaly in the book. Almost all of the key players in the second part of Horwitz's story have never been thought to be Realists by anyone else, and indeed have traditionally been seen as antagonists of Realism. How could Horwitz have managed to present them as Realists without being obviously obstinate?<sup>42</sup>

When Konefsky looked at Horwitz's first book he spent time reconstructing the network of inter-marriages and cross-ownership that made up Boston's commercial and legal elite in the early decades of the nineteenth century. With the growth of this country and the dispersion of its elites at least inter-marriage became increasingly difficult to document for any national group, though cross-ownership in the form of that great populist bogey, interlocking directorates, might be the basis for the construction of some social relationships. But by 1880, rail transport had become extensive enough that clients need no longer be generally local and vacations some distance from home became a real possibility. One of the most popular spas, as they were called, was at Saratoga Springs, known not just for its waters but especially for its race course. Here in late summer fancy lawyers gathered as did bankers, manufacturers, and transportation officials. They came together because they shared a common understanding of the world in which they lived and they shared and developed that common understanding because they came together. As such they both instantiated and built a set of social relations that bears attending to. It is here where the American Bar Association was born, not as a conspiracy, but as a gathering of like minds of like social status on like social errands to raise the standards of the profession in the face of the economic and social disorder that came with the massive industrialization that followed the Civil War.<sup>43</sup>

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42. I ask "How" intentionally, as a matter of method. I know "Why." For my answer to that question see *infra* pp. 1068-69.

43. This story has now been told several times. My favorite is still JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

Curiously, well really not so curiously, most of the major figures whose work Horwitz relies on to build up his picture of Classical Legal Thought were members of the ABA and active in its affairs. The activities of a good number of them, including Thomas H. Cooley, James Coolidge Carter, John F. Dillon, and Christopher G. Tiedeman have been chronicled many times, first by Benjamin R. Twiss,<sup>44</sup> then by Clyde D. Jacobs<sup>45</sup> and most recently by Arnold Paul.<sup>46</sup> Horwitz's footnotes indicate that he knows of, at least some of this work,<sup>47</sup> yet he chooses to ignore the connection between these men, a connection that becomes stronger when one adds to the list Theodore Dwight, Albert Keener and Victor Morawetz, other characters in his play. There are exceptions to the list; Seymour D. Thompson, a prolific treatise writer from Missouri, was apparently not a member and William W. Cook, a prominent New York lawyer, writer of a great treatise on corporations and major benefactor of the Michigan Law School, seems not to have been a member either. But both are interesting exceptions because of Thompson's more than occasional progressive leanings as detailed by Paul and because of Cook's client base that possibly meant other occasions for meeting with the people at Saratoga Springs.

I do not wish to be heard to suggest that these individuals gathered together in Saratoga Springs, decided what law would be good for the country and their clients and then worked to make that law a reality. There was no equivalent of Judge Gary's dinners for the steel industry. Rather, it was this group of men, held together by ties of interest and association, who made Classical Legal Thought and who, because of their adherence to the principles of Classical Legal Thought so admirably delineated by Horwitz, found a common interest and a pleasant association on the big white porches of great vacation hotels and not incidentally in the club rooms of New York City as well. Just as Konefsky's lawyers and merchants who lived and worked together came to understand each other's way of seeing the world and so to respond to each other's perception of the needs of the country, Horwitz's lawyers (and their clients too, I suspect) formed a group who thought alike because they learned from one another and learned from one another because they found common

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44. BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942).

45. CLYDE D. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS. M. COOLEY, CHRISTOPHER G. TIEDMAN AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* (1954).

46. ARNOLD PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF THE BAR AND BENCH, 1887-1895* (1960).

47. HORWITZ, *supra* note 1, at 24 n.96 (citing PAUL, *supra* note 46 and TWISS, *supra* note 44).

ground thinking and talking together.

And why did they find Classical Legal Thought to be a common ground between them? Here I venture a guess and only that since I do not wish to do all the work that would be necessary to come to understand these men. Classical Legal Thought had both a substantive and a procedural attraction to men who were trying to help run a country in the years around the turn of the century. Substantively, they believed it kept government off their backs as they transformed America from a nation of small entrepreneurial and mercantile capitalists into a nation of larger corporate capitalists with all of the attendant dislocation that comes with a major shift in the form of economic life in any country. Procedurally they believed that by developing a system that combined high abstraction and classification by opposition they could, as Horwitz indicates, better maintain that the decisions that were being made were not political and at the same time keep political authority in judicial, and thus relatively safe and friendly, rather than legislative, and thus relatively less safe and less friendly, hands.

Was their belief true? Was this system of thought functional? If functional, was it necessarily so? I don't know. Moderately. Of course not. And that is the point. Classical Legal Thought didn't come from the invisible hand of the idea computers in some Star Trek space. It came from the action of human beings who acted as if their system had these properties. Did it fool anyone? I don't know and I don't care to do the work to find out. Did it facilitate their enterprise? I think so because in its guise as constitutional principle it seems to have retarded legislative intervention from time to time. Could another system for ordering law have done as well or better? As a logical matter, quite obviously, though today I can't conjure one up. And that is the point. The causal efficacy of the actions of this group of humans with similar senses of what needed to be done derived out of (and not because of) close association, and the functionality, the time-bound not timeless usefulness, of those actions are compatible with an absence of necessity. That is to say, causation is not just possible, it is likely without any particular of the system bearing the old torts teacher's "but for" relationship that is so beloved of the nineteenth century historical mind.<sup>48</sup>

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48. The matter is well put, maybe better put than I have done here, by MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* (1988) a book that shared the Hurst prize with Ted White's *Holmes' Devise* volume on the Marshall Court. G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835* (1988). Sklar writes:

[My] study does not assume that small-producer, competitive capitalism was "natural" or the "true type" of capitalism, and that corporate capitalism was "unnatural," an artificial construct, or a "political" usurpation, a view corre-

What then about the destruction of Classical Legal Thought by what came later? Here again, I think paying attention to who knows and works with whom can yield insights about causation. Horwitz relies for his argument on a peculiar cast of characters: Charles Beard, A. A. Berle, Francis Bohlen, James Bonbright, Benjamin N. Cardozo, David Cavers, Felix Cohen, Morris R. Cohen, John R. Commons, Walter Wheeler Cook, Arthur Corbin, Edward S. Corwin, John Dawson, John Dewey, Richard T. Ely, Lon Fuller, Robert Lee Hale, Charles Grove Haines, Gerard C. Henderson, Wesley N. Hohfeld, Nathan Isaacs, Lewis Jaffe, Fleming James, James Landis, Harold Laski, Donald Richberg, Warren Seavey and Jerimiah Smith. All are said to be Realists.<sup>49</sup> True, he does not deny that the usual cast of characters including Thurman Arnold, Charles E. Clark, William O. Douglas, Walton Hamilton, Karl Llewellyn, Underhill Moore, Herman Oliphant, Wesley Sturges and Hessel Yntema are Realists, but he spreads the net a good bit wider than is usual and slights this traditional group with the assertion that some represent "the narrowest and most naively behaviorist versions of positivist social science."<sup>50</sup> Everyone is entitled to their opinion about the Realist's attempts at social science. I obviously think more of the body of work than does Horwitz, but that is not the important question. That question is, "What are the grounds for adding all

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sponding with the populist outlook. Nor does it assume that corporate capitalism was the natural outcome of "objective" techno-economic evolution, a view corresponding with the pro-corporate outlook. In holding, rather, that capitalism and its class relations have a history, like all else in human affairs, the study assumes that the corporate-administered stage, which transpired during the period 1890-1916, was a part of capitalism's historical development in the United States. It also assumes that neither stage was more "natural" or "less" political than the other, but that in whatever stage, historical development proceeded through human agency in such forms as social movements, political and ideological conflict, struggles over the shape and role of law and government, and so on, and in such ways as usually to have yielded wide disparities between intentions and consequences.

If the Marxists get it, can the Crits be far behind?

49. HORWITZ, *supra* note 1, at 182-85 lists many of the names. The rest are discussed in the balance of the book at some length. Some of Horwitz's list and some of his argument derives from the material first brought to light in N. E. H. Hull, *Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, 1987 WIS. L. REV. 921 (1987). Hull reproduced the various lists of Realists that Llewellyn drew up before publishing the list of twenty found in his article, Karl Llewellyn, *Some Realism about Realism, a Reply to Dean Pound*, 44 HARV. L. REV. 1222 (1931). This list of twenty has focused discussion of the question, "Who were the Realists?" for some time. Horwitz sensibly questions the list which has some serious omissions—Thurman Arnold and Walton Hamilton—as well as peculiar inclusions—Arthur Corbin, who according to Hull, objected to his inclusion, Ernest Lorenzen, Edwin Patterson and T. R. Powell.

50. HORWITZ, *supra* note 1 at 181.

these names to the movement in the first place? What, other than Horwitz's fiat, holds the larger group together?"

At first I thought the answer was "nothing." Then it became clear that all, or nearly all,<sup>51</sup> shared a kind of reformist politics that might qualify them for inclusion in some hypothetical "big tent" organization, some "progressive" popular front in the Twenties and Thirties. But there is a problem with this reading, because, if that is the criterion for admission, then two names are obviously missing: Roscoe Pound and Felix Frankfurter.<sup>52</sup> At least Pound's early work needs to be included,<sup>53</sup> though by the Thirties he was clearly on his way to becoming a troglodyte, and Frankfurter was as deeply involved in reform as any law professor on the list.

Horwitz does give Pound's early writing its due, but the structure of his narrative, focusing on the Llewellyn-Pound exchange about Realism and on the now ancient question, "Who are the Realists?" precludes much of a central role for him among the heroes. I suppose that Frankfurter's association with Legal Process jurisprudence makes it difficult to include him in the group without confronting, as to him as well, the question that has so bedeviled scholars attempting to deal with Pound's career, "Why did his politics change?"<sup>54</sup> Still, the inclusion of Pound and Frankfurter in the group makes much sense and once these two are included in the list then matters become a bit simpler.

Morris Cohen was Frankfurter's law school roommate; Felix, his son is named for Felix, the friend. Laski was a friend of Frankfurter's and Landis, a protégé. Nathan Isaacs was a student of Pound's as well as a collaborator; Hohfeld was a good friend of Pound's. Both Pound and Frankfurter are links to major progressive reform organizations like the National Civic Federation and the National Municipal League through their contacts as Harvard faculty members. Commons was active in the Civic Federation;<sup>55</sup> Rich-

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51. It is not clear to me that Fuller, Jaffe and Seavey belong in the group even on this understanding of its nature, but here I will give Horwitz the benefit of the doubt.

52. At least two of Llewellyn's lists included Frankfurter, more than included Berle, Bohlen, Bonbright and Hale, and as many as included Landis whom Horwitz includes in his list.

53. At least one of Llewellyn's correspondents who ended up on the published list, Bingham, thought that doing so was correct.

54. The answer, in both cases, I think, is not that either man's politics changed. Rather the times and the issues changed and as a result brought to the fore aspects of each scholar's thought that could be ignored at an earlier time. It is the continuity in the thought of both men that thus makes their central role in the network of scholars that Horwitz has identified so important for understanding that group of scholars.

55. SKLAR, *supra* note 48, does some wonderful work on the membership of the National Civic Federation circa 1907 that shows how one might flesh out the social world of either Classical or Progressive Legal Thought. He notes: .

berg, on the labor side as well, was active in the Progressive party and involved in drafting the NRA and the NIRA. Seavy and Bohlen (briefly) were colleagues at Harvard. Henderson and Berle were both students there in the years right after Frankfurter joined the faculty. A modest set of social relations, though one hung together by a rather suspect, anything but Realist, duo.

Of course, this does not cover everyone in Horwitz's list, but if one cuts out the truly bizarre—Jerimiah Smith, a contemporary of Langdell—and the too general to be plausible and besides, of another generation—Commons, Ely and Dewey—one is left with a more manageable number anyway and the possibility of some interesting generational comparisons. Of the balance one has one generational group—Pound, Beard and Bohlen—a second group about one-half generation younger—Frankfurter, Morris Cohen, Corwin, Hohfeld, Seavy and Richberg—then a third group, another one-half generation still younger—Berle, Bonbright, Henderson and Landis—and finally a still younger group—Cavers, Felix Cohen, Fuller, Jaffee and James.<sup>56</sup> Can one see a difference between Pound, Beard

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The federation's active leaders consisted of prominent figures from a cross section of economic, political, intellectual, religious and cultural elites: capitalists prominent in railways, communications, industry, commerce, and investment banking; former and current senior officers of the federal government; eminent members of the legal profession; national officers of farmers' organizations and trade unions; prominent publishers and journalists; high-ranking clergy; and university presidents and professors.<sup>35</sup>

<sup>35</sup> In late 1907 the NCF's officers were: president: August Belmont; vice-presidents: Samuel Gompers, Nahum J. Bachelder, Ellison A. Smyth, Benjamin I. Wheeler; Treasurer: Isaac N. Seligman. Its executive council, the inner leadership, separate from the larger executive committee, consisted of the officers; Ralph M. Easley, chair of the executive council; and the chairs of the standing committees. In 1907 these were: John Mitchell (trade agreement committee), Charles A. Moore (welfare), E. R. A. Seligman (taxation), Seth Low (conciliation), William H. Taft (public employees' welfare), Nicholas Murray Butler (industrial economics), Melville E. Ingalls (public ownership), and Franklin MacVeagh (immigration). The executive committee was organized in such a way as to regroup the various social sectors represented in it into three larger groupings conceived as constituting the society as a whole—capital, labor, and the public (with farmers categorized as part of the public). As of October 1907, the executive committee members included, in each of the three categories, the following persons:

1. "On the part of the Public": *government*: ex-president Grover Cleveland, ex-secretaries of the interior Cornelius N. Bliss and David R. Francis, U.S. Attorney-General Charles J. Bonaparte; *capital*: Andrew Carnegie and V. Everit Macy (each listed as "Capitalist"), Isaac N. Seligman and James Speyer (each listed as member of his respective investment house); *agriculture*: Nahum J. Bachelder (master, National Grange) and John M. Stahl (president, Farmer's National Congress); *religion*: Roman Catholic Archbishop John Ireland of St. Paul, Minn., and Episcopal Bishop Henry C. Potter of New York City; *higher education*: Benjamin Ide Wheeler (president, University of California, Ber-

and Bohlen and the most obvious Realist of that generation—Cook? Maybe not with Beard, but surely with Pound and Bohlen. Cook opposed the Restatement project that Pound supported and Bohlen gave his life to, and Cook constantly criticized Pound's notion that the known and knowable techniques of the common law yielded

keley), Charles W. Eliot (president, Harvard University), Nicholas Murray Butler (president, Columbia University); and Seth Low, "Publicist."

2. "On the Part of Employers": *industry*: Henry Phipps (director, U.S. Steel and International Harvester, formerly longtime partner and close associate of Carnegie), William A. Clark (president, United Verde Copper Co.), Clarence H. Mackay (president, Postal Telegraph-Cable Co.), M. H. Taylor (president, Pittsburgh Coal Co.), Samuel Mather (president, Picklands, Mather & Co., director of Lackawanna Steel, brother-in-law of John Hay), Charles A. Moore (president, Manning, Maxwell & Moore), Ellison A. Smyth (president, South Carolina Cotton Manufacturers' Association), Dan R. Hanna (of M. A. Hanna & Co., Cleveland), Marcus M. Marks (president, National Association of Clothing Manufacturers), Otto M. Eidlitz (chairman of Board of Governors, Building Trades Employers' Association); *railroads*: Lucius Tuttle (president, Boston & Maine Railroad), Frederick D. Underwood (president, Erie Railroad), Melville E. Ingalls (chairman, C.C.C. & St. Louis Railway, part of the New York Central System), H. H. Vreeland (president, New York Central Railway Co.); *finance and banking*: August Belmont (president, August Belmont & Co.), Franklin MacVeagh (president, Franklin MacVeagh & Co., Chicago, became President Taft's secretary of the treasury); *journalism and publishing*: Frank A. Munsey ("Publisher"), Charles H. Taylor, Jr. (ex-president, American Newspaper Publishers' Association).

3. "On the Part of Wage Earners": *American Federation of Labor Unions*: Samuel Gompers (president, AFL), John Mitchell (president, United Mine Workers of America), Daniel J. Keefe (president, International Longshoremen, Marine and Transportworkers Association), William D. Mahon (president, Amalgamated Association of Street Railway Employees of America), William J. Bowen (president, Bricklayers' and Masons' International Union), James O'Connell (president, International Association of Machinists), John F. Tobin (president, Boot and Shoe Workers Union), Joseph F. Valentine (president, Iron Moulders' Union of North America), James M. Lynch (president, International Typographical Union), William Huber (president, United Brotherhood of Carpenters and Joiners of America), James Duncan (general secretary, Granite Cutters' International Association of America), Timothy Healy (president, International Brotherhood of Stationary Firemen), Denis A. Hayes (president, Glass Bottle Blowers' Association of United States and Canada); *railway brotherhoods*: A. B. Garretson (grand chief conductor, Order of Railway Conductors), Warren S. Stone (grand chief, International Brotherhood of Locomotive Engineers), P. H. Morrissey (grand master, Brotherhood of Railroad Trainmen), J. J. Hannahan (grand master, Brotherhood of Locomotive Firemen). *Id.* at 204-06.

56. I have omitted Cardozo from the list. His two books were an inspiration to many of the Realists. I do not know what to do with him, but nothing rises or falls on his inclusion or exclusion as he was an isolate in ways that Brandeis, someone else that Horwitz unaccountably misses, was not. Hale, Haines and Isaacs fit between the Frankfurter group and the Berle group. It would require more work than I wish to do to decide in which generation to place them though my guess is that Haines goes with Corwin and Isaacs does too. Hale stands alone as befits that truly singular man.

definite answers to legal questions. Contrast Frankfurter's generation with the most obvious Realists—Bingham and Moore.<sup>57</sup> Here the heavy odor of progressive reform distinguishes Frankfurter, Corwin and Richberg from the two Realists who paid little attention to such causes; Seavy, again, is part of the grand Restatement project ridiculed by one and all; Cohen defined himself as an anti-Realist, thought clearly he understood, indeed made, several important "realist" points about property; and that leaves Hohfeld whose analytic jurisprudence was precisely the kind of abstraction that the Realists constantly complained of. In the next generation only Berle, who wished to come to Yale to do his great book, but was rebuffed from doing so by Hutchins, has any claim to fit with Clark, Frank, Green, Llewellyn, Oliphant and Sturges. He seems to treat law as a naturalistic phenomenon as do the others, more or less. Bonbright was interested in a question of value that no Realist could possibly take seriously; Henderson, in corporation doctrine and then there is Landis, who like many of the Realists got seduced by Washington and power, but who seemed never to be able to bring the outsider's perspective that one needed to operate well in such place back to his scholarship and who seemed less to wish to understand than to wish to make the law in action correspond to the theory on the books.<sup>58</sup>

Where then are we? In contrast to the rather close personal and social relations of the group that is generally seen as making up the Realists, Horwitz puts forth a group that, I suspect, was selected largely for the affinities with the notion that Realism is a big tent that merely continues pre-war progressive doctrinal criticism of Classical Legal Thought than for any other reason. Each seems once, or occasionally more than once, to have had an "idea" put forth in an article somewhere that either is like "ideas" put forth by individuals more prominently associated with Realism or is traceable to such Realist ideas or even to the more ephemoral "influence" of Realism.

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57. Powell and Radin of this age group are usually included among the Realists. I am not clear whether they belong there at all, however I reserve judgment until I have read all of their work.

58. I leave the youngsters for some other hand. Fuller's inclusion in the list is simply silly; he made his reputation attacking Realism and spent his entire career attempting to repair what he thought was the damage that it had done to our understanding of law. Cavers and Dawson are so clearly of another generation as to be part of some other story, though an interesting one that would include Willard Hurst. What should be made of Horwitz's one remaining nominee, Felix Cohen, is a quite complicated matter that has to do with fathers and sons as well as with the question of where an interesting book and two famous articles fit in a life that could not escape scholarship but succeeded in escaping academia. I doubt whether he belongs with either of the Realist's young kids—Douglas or Rodell. In any case children of an intellectual movement who identify with, rather than rebel against their parents pose a truly complicated problem that I will not tackle for the sake of completeness of analysis.



In other words, each was chosen for his particular, isolated, disembodied thoughts; each exemplifies the primacy of the reified category of thought—Realism—in Horwitz's book that so magnifies the difficulty of providing any causal account of the transformation in American legal thought that he is attempting to explain.

In contrast, a web of social relations for some of the law professors and others can be created around the Frankfurter-Pound dyad to such an extent that it is not wholly implausible to consider them a group, but, if a group, then a group that is equally well seen for their differences generation by generation from and with the suspects usually rounded up when Realists are wanted, as for the similarities that come from a vaguely left politics and shared doctrinal critique. My guess is that it is a real social/intellectual group of theorists and policy-makers and that had Horwitz directly confronted their special social/intellectual nature he would be remembered for doing so just as Bruce Ackerman is remembered for identifying the group of individuals now universally seen as Legal Process scholars.<sup>59</sup> What to call this group is, I think, an interesting question.<sup>60</sup> Its work led directly into the legal process scholarship of the Forties and Fifties, a scholarship that, it should not be forgotten, was a kind of reform scholarship as well as a breaking away from Realism. I don't much like the people who fall in the group, so I am not going to do the work, but my guess is that, if someone cared enough about them to do the work, that individual would find that what holds the group together is a preference for internal critique and an identification with the agenda of the "better" elements of the elite segment of the bar. Thus, though the group would share with the Realists a commitment to reform that Horwitz emphasizes (and rightly so), it would differ from that group that seems to me more, though not exclusively, committed to external critique of law and legal institutions<sup>61</sup> and more wary of, "opposed to" is clearly the wrong phrase, the agenda of the elite bar, even its better elements.

Why did Horwitz choose to lump that Frankfurter-Pound group together with the usual Realist suspects? No doubt there are many reasons. One is a clear preference for seeing the primacy of capitalized categories of thought as the major counters for telling the story

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59. Bruce A. Ackerman, *Law and the Modern Mind* by Jerome Frank, 103 DAEDALUS 119 (Winter 1974). Curiously G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973), identified this grouping of scholars first but is not known for having done so.

60. I am tempted to call them Corporate Liberals.

61. And also more committed to seeing law as an institution and not as a body of rules, though here clearly Frankfurter shares some of the predilections of the Realists. The difference is that he tended to idealize the institutional aspect of the law while Realists like Arnold, Frank and Robinson tended to debunk those aspects.

of law in the United States. Like Langdell, for whom, whatever his pretense of science, the principles of law tested the cases for their correctness and not the other way around, Horwitz uses ideas to test for group membership and not the other way around—or what would be even better, both ways around. Another reason has been noted by reviewers who have made the point that the story that Horwitz tells is set up so that the off stage party, Critical Legal Studies, is ready to ride into the scene to save the fair maiden of the law from the evil clutches of recurrent formalism.<sup>62</sup> Related to this matter of who is the off-stage hero of the story is a third, somewhat independent reason for Horwitz's choice, a matter that I have adverted to earlier: empirical social science. Horwitz sees empirical social science as a drag on social criticism and reform. Therefore, he wishes to separate Progressive Legal Thought from the baleful influence of the empirical social scientists so that his hero may march triumphantly into the present as part of current efforts at "progressive" legal reform.<sup>63</sup> To exclude empirical social science from the play, Horwitz neatly expands his categories to sweep Realism into a big tent and so make its empiricist streak seem anomalous. It is a move that Classical Legal Thought would understand and probably applaud, but it also is a form of ancestor fetishism—the nobility of ones' ancestors adds legitimacy to ones' cause—better suited to devotees of genealogical research or obscure bits of the British aristocracy. Ancestor fetishism is, I suppose, harmless or more accurately would be harmless but for Horwitz's standing in the world of legal history. But given that standing, so glaring an example of allowing present concerns to color our approach to the past, a bit of Lawyer's History of the kind that he once so effectively challenged,<sup>64</sup> does little to hold lawyers' worst instincts<sup>65</sup> at bay. Which is not to say that Horwitz is probably wrong about the bulk of social science research today. That fact, however, does not mean that such was the case in the Twenties and Thirties. Remember, neither rules nor any other human practice has any necessary function or meaning, including practices that we at present do not like. Past meaning is al-

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62. See G. Edward White, *Transforming History in the Post-Modern Era*, 91 MICH. L. REV. 1315 (1993); N. E. Duxbury, *The Theory and History of American Law and Politics*, 13 OXFORD J. LEGAL STUD. 249 (1993).

63. A smaller "big tent" that includes Feminist Legal Studies and Critical Race Theory.

64. See Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973).

65. My current favorite example of lawyers' worst instincts is the recovery of civic republicanism in constitutional law. On this topic Alan Freeman & Betty Mensch, *A Republican Agenda for a Hobbesian America?*, 41 U. FLA. L. REV. 581 (1989), do some necessary balloon puncturing.

ways a matter of past understanding. In the relevant period empirical social science was, I believe, not only not harmful, but in fact progressive.

Now what does this disquisition about the people in Horwitz's book say about causation? Only this. If Horwitz were more careful of social relations that help define groups of scholars when he writes, he might both see that they help get beyond "the death of causation" that he is so obviously uncomfortable with and similarly might avoid seeing unlikes as likes, or at least be more aware of the kind of strong argument that need be made if he really wants to argue for the big tent of inter-war reform. He might even see the ways that Critical Legal Studies was a distinctive note in its time. Being both an internal critique and deeply opposed to reform in either its better or worse guises, the movement could not be distanced as was Realism—it's not doctrinal, so it's not really law—but only by declaring that participation in the enterprise of reform was the *sine qua non* for acceptance in the legal academy. Thus its members might have understood, nay even expected, Paul Carrington's suggestion that they voluntarily leave the law school world.<sup>66</sup> But of course that is another story, one that I started to tell in another place and besides the wench is dead.

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66. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).